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SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1940.

No. 1015 69

C. A. ROSS, AGENT, INC., a corporation of North Carolina, (amended by order of the Court to read ROSS MOTOR LINES, INC.),

Petitioner,

vs.

LOUIS VENUTO, Administrator ad Prosequendum and General Administrator of the Estate of ELVIRA VENUTO, deceased, and Administrator ad Prosequendum and General Administrator of the Estate of ANNA VENUTO, deceased, FLORENCE VENUTO, VITO CUOZZO and MARIE CUOZZO,

Respondents.

PETITION AND BRIEF IN SUPPORT THEREOF

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

To the Honorable, THE CHIEF JUSTICE *and* ASSOCIATE JUSTICES *of the Supreme Court of the United States:*

Ross Motor Lines, Inc., the petitioner herein, respectfully presents its petition for a writ of certiorari to review the final judgment of the United States Circuit Court of Appeals for the Third Circuit, which decision in the above case was rendered on March 14th, 1941, and affirmed judgments in favor of the respondents herein entered in the United States District Court for the District of New Jersey.

Summary and Statement of Matters Involved.

This case was brought by the plaintiffs against the defendants, Ross Motor Lines, Inc., and Lewis L. Robinson, to recover for personal injuries sustained to some of the plaintiffs and for the deaths of two of the plaintiffs' intestates as a result of a collision on a public highway in Linden, N. J., on July 3rd, 1937, by a motor truck owned and operated by Lewis L. Robinson and engaged in the haulage of interstate freight. The defendant Robinson was charged with direct negligence in the operation of his truck and the defendant, Ross, was charged with liability on the sole theory that it was the employer and master of the defendant, Robinson.

Ross set up the defense that Robinson was not its agent and servant and was, in fact, an independent contractor. The trial judge instructed the jury that if Robinson was an independent contractor, it must find in favor of Ross and submitted to the jury for its determination the sole question as to whether or not Robinson was the agent and servant of Ross. The jury found by its verdict that Robinson was the agent and servant of the defendant, Ross. The Circuit Court of Appeals found that the trial judge committed error in submitting to the jury the question of whether Robinson was the agent and servant of Ross, but held that the verdicts could be supported on the theory that although Robinson was an independent contractor, Ross was chargeable for his conduct upon a "vicarious liability" of an employer of an independent contractor.

This decision is at variance with precedence in the State of New Jersey, where the accident occurred, and also with deeply rooted precedence in the common law.

At the time of the accident and for some time prior thereto, both Ross and Robinson were duly authorized

common carriers by motor truck in interstate commerce, pursuant to the provisions of the Motor Carrier Act of 1935. At the trial of the action, judgments were returned in favor of the plaintiffs and against the defendants, from which judgments the defendant, Ross, appealed to the Circuit Court of Appeals for the Third Circuit, which court affirmed the judgments entered in the District Court.

This case involves the novel and important question as to whether a common carrier duly authorized by the Interstate Commerce Commission to engage in interstate commerce by motor truck, in availing itself of the services of another common carrier duly authorized by the Interstate Commerce Commission to transport goods received by the first carrier, thereby assumes full responsibility to the entire world for actions arising out of accidents on the public highway involving the second carrier's vehicles, although the second carrier is, admittedly, an independent contractor and not the agent and servant of the first carrier.

This question is of great moment not only to the authorized motor truck carrier of the merchandise, but it has far-reaching consequences as to the liability of the insurance carrier of the original motor carrier, inasmuch as the Motor Carrier Act of 1935, 49 Stat. 557, 49 U. S. C. A. 315, imposes absolute liability upon the insurance carrier for accidents arising out of the operation of the assured named in the policy, and the insurance carrier, if the holding for which review is sought be not reversed, would thus have imposed upon it vast and ruinous liabilities which it could not anticipate in fixing its rates.

It also involves the important question as to the general liability of an independent contractee for the negligence of an independent contractor; and it further involves the question whether the Circuit Court of Appeals has the right to affirm the judgments of the District Court on a

theory entirely outside the scope of the pleadings and the issues submitted to the jury and upon a ground which was expressly eliminated from the jury's consideration by the trial court.

At the trial motions were made for nonsuit and direction of verdict and the appeal to the Circuit Court of Appeals was based upon the denial of those motions as well as errors in the charge of the trial court, denial of request of the defendent, Ross, to charge the jury, and the rulings of the trial court on questions of evidence.

We are also here concerned with rulings in the trial court and the appellate court, which prejudiced the substantial rights of the defendant, Ross. Ross in the pleadings was charged with being the master of Robinson in a relationship allegedly based upon a common law and not a statutory obligation, although the trial judge, over the objections of counsel for Ross, permitted testimony to be submitted as to statutes and rules of the Interstate Commerce Commission in support of the plaintiffs' case, entirely at variance with the issue and the pleadings, thus confronting it at the trial, over objection of its counsel, with a new issue outside of the pleadings. The Circuit Court held that such proof was not required to sustain the verdicts but, thereafter, in its own opinion cites the proof submitted at the trial by way of rules and statutes to support its own holding.

There must be some reasonable control of proof within the pleadings even under the existing liberal construction of the rules so as not to require a defendant to meet an issue of which it had not been apprised prior to the trial.

Basis of Jurisdiction.

This action was originally instituted in New Jersey Supreme Court, Essex County, and was removed on application of defendant, Ross, to the United States District Court, District of New Jersey, upon the ground that the petitioner was a citizen of the State of North Carolina and the plaintiffs were citizens of the State of New Jersey, and the amount in controversy exceeded $3,000.00, exclusive of interest and costs. Jurisdiction in such cases is conferred upon the Federal District Courts by the Judicial Code, section 28, amended (28 U. S. C. A. 71).

Petition herein for writ of certiorari is made under authority of the Judicial Code, section 240, amended (28 U. S. C. A. 347).

Questions Presented.

1. Whether the defendant, Ross, was liable for the negligent acts of Robinson, who was admittedly an independent contractor under the novel theory of "vicarious liability" as expounded by the Circuit Court of Appeals.

2. Whether the defendant, Ross, under the facts in this case, was liable for the negligence of Robinson, an independent contractor, where both Ross and Robinson were duly licensed carriers of interstate freight by the Interstate Commerce Commission pursuant to the Motor Carrier Act of 1935.

3. Whether the Circuit Court of Appeals for the Third Circuit committed error in affirming the judgments below upon a theory entirely outside of the scope of the pleadings and outside of the issue presented to the jury.

Reasons Relied on for Granting the Writ of Certiorari.

The reasons relied on by the defendant, Ross, for the granting of certiorari are that:

1. The Circuit Court of Appeals for the Third Circuit has decided an important question of local law in conflict with applicable local decisions.

2. The Circuit Court of Appeals of the Third Circuit has decided an important question of federal law, which has not been, but which should be, settled by this court.

3. The Circuit Court of Appeals for the Third Circuit has so far departed from the accepted and usual course of judicial proceeding as to call for an exercise of this court's power of supervision.

Wherefore, your petitioner respectfully prays that a writ of certiorari may issue to the Circuit Court of Appeals for the Third Circuit to review its judgment affirming the judgments of the United States District Court for the District of New Jersey.

CHARLES A. ROONEY,
Attorney for Ross Motor Lines, Inc.,
Petitioner.

SAUL NEMSER,
Of Counsel.